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E. ROBERT SEAVER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

BOARD OF REGENTS OF STATE COLLEGES, ET AL.

v.

ROTH

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

The American Association of University Professors (the "AAUP") appears *amicus curiae*, with consent of all parties, in support of respondent. This is a companion brief to that filed by *amicus* in *Perry* v. *Sindermann*, Case No. 70-36, which has been paired for argument with the instant case. This brief, therefore, is essentially to complement considerations developed in the *Sindermann* brief.

INTEREST OF AMICUS CURIAE

The statement of *Interest of Amicus* in our *Sindermann* brief is fully applicable to the instant case. The present statement focuses on the concern—indicated in the petition for *certiorari* in the instant case, the briefs in support of the petition, and the dissenting opinion in the Court of Appeals below—as to the implications for the integrity of the tenure system, the objective of quality education, and the possible burdens and problems, both for our colleges and universities and the courts, that the opportunity for procedural due process for nontenured faculty may present.

The AAUP was established in 1915; its founders included such eminent scholars and educational leaders and philosophers as Roscoe Pound, John Wigmore, John Dewey, Arthur O. Lovejoy, Wilbur L. Cross, A. A. Michelson, and Edwin R. A. Seligman. Its current membership consists of approximately 90,000 faculty members of accredited institutions of higher education. As indicated by AAUP's issuance in 1915 itself of a *Declaration of Principles* on academic freedom and tenure, the subsequent development of the 1940 *Statement of Principles on Academic Freedom and Tenure* (which now carries the endorsement of over eighty of the leading educational and professional organizations), and its development most recently of the 1971 *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, the issues in the *Roth* case as they have implications for adequate standards and practices relating to academic freedom, tenure, and the quality of higher education have been a matter of primary and constant concern to the AAUP. AAUP has played a crucial role as well in the resolution, during the past half century, of academic

freedom, tenure, and related academic disputes, informally as adviser and mediator whenever possible, and formally as investigating agency when necessary.

As summarized in a recent intensive study, *Developments in the Law—Academic Freedom*, 81 *Harv. L. Rev.* 1045 (1968), the AAUP has as its basic mission "to safeguard the integrity of higher education"; it is "generally accepted today as the spokesman for college teachers, and its assistance is sought in virtually every academic freedom dispute"; "it has never considered itself to be principally an advocatory legal aid society. Rather, the AAUP views protecting the individual's rights as part of a higher function; it sees each dispute as an occasion to clarify and secure acceptance of what it believes to be the general principles underlying academic freedom." 81 *Harv. L. Rev.* 1045, 1105-1106, 1109. Thus, membership in the Association is not a prerequisite for assistance. Indeed, a very substantial number of its cases has always related to nonmembers; in addition to faculty, institutions and administrators seek and obtain the advice and intervention of *amicus* in the resolution of cases and problems concerning academic freedom and tenure.

The Association has additionally acted to support academic principles and standards in litigation significantly affecting such principles and standards. It has filed briefs as *amicus* in this Court in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Jones* v. *Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert.* denied 397 U.S. 991 (1970); and in *Sindermann*. Various local chapters have also participated in cases that have come before this Court and in lower courts, *e.g.*, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964);

Georgia Conference of the AAUP v. *Board of Regents*, 246 F. Supp. 553 (N.D. Ga. 1965) and *Heckler* v. *Shepard*, 243 F. Supp. 841 (D. Ida. 1965).

The AAUP believes that during the past half century it has as much as any organization acted continuously and comprehensively to develop and further the principles and standards relating to tenure as a safeguard which is fundamental and, in the judgment of *amicus*, necessary for the maintenance of academic freedom. The AAUP has emphasized throughout the fundamental role of adequate procedural safeguards as necessary to give meaning and reality to these as to other substantive principles and safeguards, as well as to the constitutional rights generally of faculty, as teachers and as citizens. It is in this context that *amicus* filed its brief in *Sindermann*, and does so in the instant case.

SUMMARY OF ARGUMENT

Amicus emphasizes its conviction, indicated in its *Sindermann* brief, that the law in this area should continue to evolve "under this Court's general guidance—based upon a broad recognition that the academic freedom and constitutional rights of nontenured and probationary faculty members do require *some* procedural safeguards in *every* case." (See pages 11 and 36, and Part II generally, of that brief.)

In the instant case, affirmance of the opinions and order below is essential in order to provide minimal due process for teachers in matters critical to their basic livelihood. Such due process as it relates specifically to teachers will act in furtherance of principles and standards developed for the protection of academic freedom, and of tenure as a fundamental safeguard of such freedom. It is our position, moreover, that pro-

cedural due process, as exemplified in the facts of the instant case by a statement of reasons for nonrenewal and the carefully delimited form of administrative hearing provided in the order of the trial court, would not present undue (if any) burdens upon our colleges and universities, or constitute intrusion by the courts into their affairs. We shall contend further that the order of the trial court falls well within the area of discretion traditionally accorded the *nisi prius* court. We shall finally submit that further proceedings in the case in accordance with the order and opinions below, will provide an excellent opportunity to appraise the validity of the respective concerns and claims presented in this case and in the numerous other cases that have been developing in this sensitive and complex problem area.

ARGUMENT

I. Affirmance by This Court of the Opinions Below Would Essentially Apply Minimal Procedural Due Process to Teachers as it Has to Other Citizens. Such Application Is Especially Relevant to the Protection of Academic Principles and Standards.

The role of procedural due process in matters or action substantially affecting a person's livelihood and welfare has been one of evolving concern and refinement within the academic, as it has been for the general community. *Cf.*, the *Statement of Interest* and *Part II* of the *Sindermann* brief; *Goldberg* v. *Kelly*, 379 U.S. 254 (1970); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 *Duke L. J.* 841. As indicated by the *Sindermann* case itself, many colleges and universities do not recognize tenure altogether. Commonly in such institutions, no internal protection or restraint against wholly arbitrary action is provided any faculty member, even if in direct derogation of

academic principles. *Cf. Thaw* v. *Board of Public Instruction*, 432 F.2d 98 (5th Cir. 1970). In numerous institutions tenure is recognized, but only for certain ranks of faculty; other faculty members can and do remain in untenured status indefinitely. In various institutions the period of probation can be as long as fifteen years or even more; as indicated in the petition for the writ of *certiorari* (see its footnote 1), the period of probation is often increased, frequently with retroactive effect. In general, under accepted academic practice, tenure status relates only to the institution itself, so that with the current degree of mobility in the academic as in other communities or professions, the number of teachers who, for this reason, remain indefinitely in nontenure status, or who return to nontenure from tenured status, is substantial. Accordingly, *Sindermann*, *Roth*, and similar cases afford protection of minimal due process for an important part of our teaching community.

Appellants are correct that to give identical or substantially the same protection to all faculty would act to undermine the concept of tenure. It is for this very reason that the AAUP earlier informally accepted as appropriate the premise that, unless considerations violative of academic freedom are significantly involved, the matter of procedural due process as it relates to the renewal or nonrenewal of faculty should essentially be a matter of institutional determination. AAUP Advisory Letter No. 13. Joughin, *ed., Academic Freedom and Tenure* (1969 ed.) 136. For those colleges and universities wishing to provide due process for their faculty in nonrenewal as in other respects, the AAUP acted during this period as a clearing house or adviser in regard to the development of or experience relating to such procedures.

The adoption by *amicus* in 1971 of its Statement on *Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (the "1971 *Statement*"), treated *in extenso* in its Sindermann brief, stemmed from a steadily growing concern within the academic profession as to the need for at least some procedural safeguards in this area. In part, this concern reflected the same considerations that underlie *Goldberg, Sniadach*, and other recent cases. In part, the development of the 1971 *Statement* evolved out of the increasing awareness of the Association, that the absence of *any* safeguards with respect to renewal or nonrenewal of faculty, whether generally in the particular institution, or for particular ranks or individuals, has pervasive implications for the protection of academic freedom itself: Absent any and all procedural rights or safeguards for nonrenewal of nontenured faculty, termination of appointments for considerations violative of academic freedom or related constitutional rights can and does become essentially a matter of administrative exercise of patience. Freedom of thought and inquiry is hardly the less inhibited because reprisal for its exercise is subject to delay. Rather, the delay can and does act to cloak the fact of reprisal; further, it adds to the already difficult burden of proof upon the faculty member to establish that the nonrenewal was in derogation or denial of academic freedom.[1]

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[1] The variations and permutations that are possible and have developed as to the uncertainties and threats to academic freedom that persist for those in nontenure status are dishearteningly numerous. As one example, the Association in 1968 found it desirable to publish a *Report on Retirement and Academic Freedom* because of the problems as to maintenance of such freedom for retired faculty members who remain at an institution in nontenured status or for those who are approaching retirement age and desire to remain in active service. 54 *AAUP Bull.* 425 (1968).

As a result, in a basic sense, the concept of tenure operates by way of *analogy* as well as of contrast, as to the appropriateness and need of some procedural due process for those in nontenured status:

> The tenure concept itself (that after a designated probationary period during which the employer has had an adequate opportunity for evaluation, termination of a person's appointment is appropriate (i) only for reasons related directly and substantially to fitness for that appointment, (ii) established by procedures reflecting basic concepts of due process) has, like Civil Service and similar, continuous appointments outside the academic community, its independent justification as a matter of sound personnel practice. As developed in the academic community, however, its primary function is to provide the teacher and researcher the necessary sense of assurance of protection against the risk of loss of his position for reasons violative of academic freedom and related constitutional rights: Without appropriate procedural protection from arbitrary termination, the teacher's sense of freedom in teaching and research is necessarily inhibited and diminished.

If, as the academic community in this and in other countries has insisted, this premise is correct, then *some* procedural due process is necessary for *all* teachers and researchers against wholly arbitrary termination, unless, of course, liberty of thought and inquiry within the academic community is to be enjoyed only by those with tenure. From the fact that the same degree of procedural due process ought not necessarily be provided for nontenured as for tenured faculty, it hardly follows that complete denial of due process to nontenured faculty is the necessary or appropriate alternative.

Experience has indicated in still another key respect the desirability, exactly out of respect for the tenure concept, for *some* procedural protection of nontenured teachers: If probationary faculty are denied *any* procedural protection against wholly improper termination, or termination in derogation of academic freedom or First Amendment rights, then strong pressures develop and persist—by individual action during a "seller's market" and by collective action through organization or bargaining at other times—to grant tenure prematurely, either by the adoption of too short a period of probation and evaluation or by untimely exercise of administrative discretion. It is precisely such pressures and response to them that serve to undermine the tenure concept and the objective of quality education.

In brief, *amicus* submits that (1) nontenured faculty are entitled to procedural due process as are other citizens under the Fourteenth Amendment in matters basic to their welfare; and (2) there is a basic interrelationship of due process and academic freedom with regard to probationary just as there is with regard to tenured faculty, although the specific nature of the due process in each case may and should differ in substantial respects. As the second of these considerations further suggests, it is entirely too simplistic to consider the matter one of a conflict of the interests of the institution and those of its individual faculty members. Rather, due process would serve the interests of both.

II. Minimal Due Process, as Exemplified by a Statement of Reasons and a Limited Hearing, Would Not Present Risks of Institutional Hardship, Unworkability, or Unwarranted Intrusion of the Federal Courts Into Higher Education.

The AAUP does not know of any substantial body of evidence upon which to predicate a conclusion of any significant risk of complex, expensive, or unworkable burdens that would be imposed upon colleges and universities merely by requiring *some* due process in connection with nonrenewals. Prior and wholly unrelated to its 1971 *Statement*, the Association had recommended —and many institutions have adopted as policy—procedures of varying nature for resolution of academic disputes, involving either institutional proceedings against faculty, or grievances by faculty against institutions. These procedures have encompassed, comprehensively, such matters as salary, assignment of teaching duties, assignment of space or other facilities, and propriety of conduct generally. Procedures have been recommended for contested terminations of appointments based on health considerations or discontinuance of programs or departments of instruction. Most recently focus has been given to procedures regarding terminations or reassignments of faculty in the varied and difficult situations of financial exigency in which many institutions are finding themselves today. As indicated in the *Sindermann* brief, in the context of nonrenewals itself, where academic freedom is in issue, procedures have been in existence for a number of years; such procedures have been extended to graduate student academic staff and administrative personnel with academic responsibilities. In the context of nonrenewals generally, various institutions have provided for internal procedures as a matter of policy, reflecting what they consider a basic sense of due process. See in

general the AAUP's 1968 *Recommended Institutional Regulations on Academic Freedom and Tenure*, 54 *AAUP Bull.* 448 (1968), especially sections 4(c), 10, 11, 13 and 15; see also footnote 1, *supra*. The considered judgment of the Association is that the perception as to the need in the wide variety of instances of academic dispute or concern for *some* element or form of due process *as determined by and related to the specific type of grievance or action*, has not in fact acted to impose inappropriate or undue burdens or hardships.

Affirmative considerations apply as well. The fact of entitlement of probationary faculty to stated reasons and limited intramural review with respect to renewal or nonrenewal, encourages and assures the very kind of careful evaluation *prior* to decision that they have a right to expect as a matter of good faith on the part of the employing institution, and that are at least implicit in their appointments as probationary faculty; such evaluation will permit and indeed facilitate the rejection of the unqualified as well as the retention of those with promise, and contribute to rather than derogate from the development of a strong and capable faculty body. In sensitive fact situations as in *Sindermann* and *Roth*, to the extent that procedures are available which help assure sound and correct decisions, to that extent there are reduced or eliminated internal and often external tensions and stresses—and so the burdens and hardships—for the college or university community; these tensions and stresses commonly follow when purely arbitrary action is possible and is in specific issue, and the academic and outside communities are in no position to reach a judgment or to have confidence in the action taken exactly because no due

process has been provided.[2] The experience of the AAUP with respect to dismissal proceedings indicates that the fact of due process as an integral right, itself operates to minimize the actual need for proceedings: As to administration, the presence of the right of the faculty member to due process serves, preventively, as a pressure on it to take appropriate care initially in reaching proper and sound decisions; as to faculty, the implications for a teacher of an adverse decision *after* due process, discourages improper challenges of administrative action. With respect to initial appointments, the entitlement of an appointee to some due process in case of termination will operate to insure *greater* care in the selection process to the advantage of the institution, rather than in "a teaching force of homogenized mediocrities," as suggested in appellant's petition (page 12).

Respectfully, the AAUP wishes to note for the information of this Court that the alleged administrative inconvenience accompanying the merely minimal degree of procedural due process affirmed by the court below is an inconvenience imposed more substantially on senior faculty members not represented here by the *amici* in support of the petitioner, but substantially represented by the AAUP. Under general practice in institutions of higher education, it is the senior faculty

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[2] For an example of a case developing in sharp focus the problems, burdens, and exacerbations that the *absence* of due process provides for the university itself as well as for the faculty member, see *Academic Freedom and Tenure: Gonzaga University*, 51 *AAUP Bull.* 8, especially 13-14 (1965). Much of the problem in that case resulted from the fact that at issue in the case was whether the faculty member had achieved tenure status or was still on probationary appointment, and the failure of the institution, acting on the latter assumption, to provide *any* due process.

within each department which makes the critical recommendation to renew or not to renew the contracts of probationary faculty members, together with the particular senior faculty member currently serving as departmental chairman. It is therefore ordinarily *their* statement of reasons which must be furnished, and the integrity of *their* judgment which the limited hearing permits to be reviewed. The position of the Association in this case therefore ought not to be understood as advocating a position it has not fully weighed in terms of the implications of the decision below to its own members who are to be bound by it. Perhaps more than any other party before this Court, the AAUP has been keenly concerned to avoid the constitutionalizing of procedures not truly essential to fundamentally fair treatment of probationary faculty members or procedures unreasonably imposing upon the time or discretion of more senior faculty members responsible in the first instance for the quality of their own departments. That the Association's own 1971 *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* in certain respects goes further than the decision below (and indeed was proposed by the Association's oldest standing committee, all of whose members are themselves tenured and affected by the Statement in their administrative capacities), reflects a clear deliberation and conclusion that the gain in care and quality of renewal decisions and the gain in fundamental fairness to the individual whose career is to be affected make the burdens of care and review a positive and essential gain to the quality of administration itself.

Similarly, with respect to the fears expressed as to improper intrusion by courts in academic matters (see, *e.g.*, the dissenting opinion below, 446 F.2d 810, 811),

the argument is better seen the other way. To the extent that procedural due process is provided *within* the academic community, there will be much less basis for pressure upon, or need for, the courts to provide it. Likewise, even when judicial recourse may be sought on substantive First Amendment and other constitutional rights, the courts will profit from receiving through the institutional proceedings judgments on the academic aspects of the case of those who are expert and sophisticated in such matters and who are in the best position to make the "exceedingly difficult" "personal judgments" on the "intangible qualities" cardinal to academic decisions that were a matter of concern in the dissenting opinion below. In short, *amicus* reads the effect of the order and opinions below not to require that academic judgments and decisions be made by the courts, but rather that they be made with more reassuring care within the academic community itself.

Clearly, in the matter of nonrenewals, the reconciliation of opposing factors both as they relate to basic due process of faculty as citizens, and as they relate directly to the needs and purposes of the academic function, has not been an easy one, as indicated by the involved history of the development of procedures within the academic community itself. It is as a result of this very history, however, that it is the considered present judgment of *amicus* that the degree of due process affirmed below is consistent with and indeed would further the objective of quality education and the goals and purposes for which the tenure principle itself has been developed.

III. The Order of the Trial Court Falls Within the Area of Discretion Traditionally and Soundly Accorded That Court. Further Proceedings in the Case Under That Order Would Serve Constructively to Test the Validity of the Respective Positions and Concerns Presented in This and Similar Cases.

As indicated by the opinions below and the statement of facts in the petition for *certiorari*, the instant case involves a faculty member who had a contract as a probationary (rather than a purely temporary) faculty member for the academic year 1968-69; he was advised on January 30, 1969, that he would not be reappointed for the 1969-1970 school year; he was given no reasons for the decision, nor was he offered a hearing of any kind. He promptly brought suit in March, 1969. Under the bill of complaint, and as corroborated by the findings below, First Amendment issues are clearly implicated in the case. The case reached the point of possible partial summary judgment a full year later, in March, 1970. At that time the trial court required that the defendants provide the plaintiff a written statement of reasons for the nonrenewal, and within the next three and a half months a hearing in which the plaintiff could respond to the reasons stated for his nonretention.

The trial court indicated that the burden of going forward and the burden of proof would rest with the teacher, and that "Only if he makes a reasonable showing that the reasons stated are *wholly* inappropriate . . . or that they are *wholly* without basis in fact" would the University have any obligation to show that the "stated reasons are not inappropriate" or "that they have a basis in fact." (Emphasis added) (p. 980) There was clear recognition in the opinion that a standard very substantially different from "cause" as required in the case of termination of tenured faculty,

or of nontenured faculty prior to the expiration of their term of appointment, was to be involved. There was sensitive recognition of the necessity that "the university should enjoy the widest possible latitude consistent with protection against arbitrariness and against invasion of . . . First Amendment rights (p. 983); to the obligation of the trial court, throughout the proceeding, "to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons" (p. 979); and that "[I]t will not do to ignore [the] danger to the institution and to its central mission of teaching and research" should "in practise . . . the university become so inhibited that . . . the university [will be] . . . unable to rid itself of newcomers whose inadequacies are . . . grave but not easily defined." (p. 979) The order and the explicating memorandum opinion reveal an appreciation of the need for careful balancing of the relevant interests, and for a case by case application of the conflicting considerations. The judgments in these respects were made by a court presumably familiar with the local state university system and in a position best to appraise the implications of these interests and considerations for that system.

Presumably the sensitivity and discernment as so articulated by the trial court will be reflected in the event of further proceedings under the order below. Quite possibly, this Court or *amicus* on the basis of its 1971 *Statement* itself could in various respects develop alternatives or modification in approach to the proceedings envisaged by the order below. This, it is respectfully submitted, is not the issue: In complex and sensitive issues of this nature considerable discretion traditionally rests with the trial court. Such discretion,

as carefully and meticulously exercised in the instant case, can hardly be characterized as unreasonable.

Indeed, the widely varying differences in opinion and appraisal presented in the conflicting decisions and reasoning in the federal and state courts on an issue of sharply growing concern to the academic community, and reflected in the opposing statements of position of the parties and the various *amici* in the instant case itself, suggest the need for the "laboratory" experimentation characterized by the late Mr. Justice Brandeis as desirable in areas of substantial social significance. Given the facts of the instant case; its conceded substantial implications for the academic community; the significant First and Fourteenth Amendment issues implicated; the care and perceptiveness accorded by the trial court to the issues and to their significance for both institution and faculty; and the carefully delimited substantive and procedural bases under which further proceedings would be conducted under the order below, *amicus* suggests that the instant case, in its present posture, provides an admirable opportunity effectively and realistically to test out the validity of the respective positions and contentions before this Court.

CONCLUSION

The matter of procedural due process as it relates to teachers has from the outset been one of evolving refinement and amplification, as required by the developing needs and functions of higher education. *Amicus* agrees with the decisions of the courts below in the instant case that it is entirely too simplistic to think in terms of alternatives that provide full due process or no due process at all.

It has aptly been pointed out by an outstanding authority on administrative law that:

> In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice Jackson in saying: "Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for Government itself against those blunders which leave lasting stains on a system of justice"—blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. Gellhorn, Summary of Colloquy on Administrative Law, 6 *Journal of the Society of Public Teachers of Law* (1961) 70, 73.

The American Association of University Professors agrees.

Respectfully submitted,

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